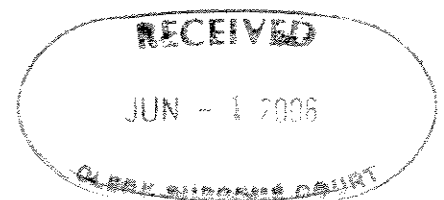


STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE: PROPOSED ADMINISTRATIVE ORDER
REGARDING ASBESTOS-RELATED DISEASE
LITIGATION

ADM File No. 2003-47

**PETITIONERS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
ALTERNATIVE A TO PROPOSED ALTERNATIVE ADMINISTRATIVE
ORDERS REGARDING ASBESTOS-RELATED DISEASE LITIGATION**



INTRODUCTION

At the Public Hearing on the Court's Alternative Administration Orders, Dr. Rosenman suggested that the American Thoracic Society's Statement on diagnosis of asbestos-related disease would be better than the ABA Recommendations. This Brief is submitted to comment on the American Thoracic Society's statement and why the ABA Recommendations are more appropriate for determining which cases should be placed on the Inactive Asbestos Docket.

To connect medical science to fundamental tort principles, the Court need only look to the most basic of requirements – plaintiffs must demonstrate that they have been damaged by exposure to asbestos. The requirement of damage is not a new or novel concept. Traditionally, an injury must be accompanied by harm in order to recover in the tort system. The Restatement (Second) of Torts (1965) § 7, comment b, states the following:

"Harm implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes or alterations may be either beneficial, detrimental, or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm.

Using the American Bar Association (ABA) Recommendations (2003) and American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Fifth Ed. 2000) ensures that a claimant not only has an injury, that is, an asbestos-related disease made by a diagnosis, but also that the claimant has demonstrable harm, that is, the functional impairment that justifies compensation.

The American Thoracic Society's (ATS) Official Statement on the Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos, December 12, 2003 (published September 2004) does not focus on impairment evaluations for asbestos-related diseases, but it

stresses the criteria for *diagnosis*; namely, the determination of structural pathology, evidenced by imaging or histology, and causation, including ruling out alternative plausible causes. (See ATS Statement, at 691). The ATS Statement asserts that the "[d]emonstration of functional impairment is not required for the diagnosis of a nonmalignant asbestos-related disease..." (*Id.* at 691). The ATS Statement specifically states that "these guidelines are designed for *clinical* application, *not for* research, epidemiologic surveillance, *screening, litigation, or adjudication.*" (ATS Statement, at 692, emphasis added).

In contrast, impairment involves the assessment of the loss of use or function of a body part or organ system. (See AMA Guides to the Evaluation of Permanent Impairment, section 1.2, at 2) (Fifth Ed., 2000, Sixth Printing June 2005). Pulmonary function tests are the most useful studies in assessing the loss of use or functional changes of the lungs from interstitial lungs disease caused by asbestos exposure. (*Id.*, section 5.1b, at 88). Further, pulmonary function tests can aid in the diagnostic process, as "the classic finding in asbestosis is a restrictive impairment." (ATS Statement at 697).

By requiring plaintiffs to show a minimum level of functional impairment, that is, a statistically significant loss of function (i.e., usually below the lower limits of normal), the Court will distinguish between injury (exposure or structural pathology evidenced by imaging) and damage (functional impairment). By requiring the assessment of functional impairment, as opposed to just a diagnosis, the Court prioritizes the allocation of resources in favor of those plaintiffs with impaired lung function.

In developing procedures for allocating the limited resources of the judicial system and compensation dollars, this Court must address several public policy concerns. The ATS Statement is NOT a determination of impairment or prognosis, but instead a diagnostic standard

for nonmalignant disease related to asbestos. Therefore, other criteria must be applied by the Court to reach sound public policy goals, including the conservation of judicial resources, and fairness to all plaintiffs. The ABA Recommendations for minimum impairment criteria accomplish these goals. The ABA criteria establish a minimum level of impairment for asbestos-related diseases, specifically addressing restrictive impairment, which as the ATS Statement sets forth, is "the classic finding in asbestosis.." (ATS Statement, at 697).

Respectfully Submitted,
DICKINSON WRIGHT PLLC

By: 

Robert S. Krause (P16228)

Attorneys for Petitioners
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Dated: May 31, 2006

DETROIT 19326-3 939123v1